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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO DANIEL
ROMERORODRIGUEZ,

Defendant and Appellant.

H045565
(Santa Clara County
Super. Ct. No. F1867353)

Defendant Alfredo Daniel Romerorodriguez pleaded no contest to felony driving or taking a vehicle with a prior conviction (Veh. Code, § 10851, subd. (a); Pen. Code, § 666.5), misdemeanor resisting an officer (Pen. Code, § 148, subd. (a)(1)), and misdemeanor harming a police dog (Pen. Code, § 600, subd. (a)). The trial court granted him probation and ordered as a condition of his probation that defendant was “not to knowingly possess any item that under the law would be considered a deadly or dangerous weapon during the period of probation.” Defendant’s trial counsel objected to this condition as unwarranted and asked the trial court to append to the condition’s language “with the intent to use them as such” to eliminate any vagueness. The court concluded that the condition was warranted and was neither vague nor overbroad as written. It overruled the objection and rejected the request to add language to the condition.

On appeal, defendant renews his objections to this probation condition. He contends that it was not reasonably related to his crimes or to his future criminality and that the requested additional language was necessary to overcome its vagueness and overbreadth. We reject his contentions and affirm the order of probation.

I. Background

Defendant was apprehended by police dog Scotty for the driving or taking offense. During his apprehension, defendant was seen “gripping Scotty’s snout in an attempt to pull the dog’s mouth off of him. In the struggle, the defendant also reached around the dog’s head in an effort to gouge the dog’s eyes.”

Defendant was charged by complaint with felony driving or taking a vehicle with a prior conviction, misdemeanor resisting an officer, and misdemeanor harming a police dog. After the court gave an indicated sentence of probation with seven months in jail, which would include defendant’s violation of probation in a prior driving or taking a vehicle case, defendant pleaded no contest to all three counts and admitted the prior conviction allegation.

The probation department recommended that the court impose as a probation condition “[t]hat defendant shall not knowingly possess any items under the law that would be considered a deadly or dangerous weapon.” Defendant’s trial counsel objected to the recommended weapon condition. “I don’t think that no dangerous or deadly weapons makes sense.” The prosecutor noted that “defendant tried to gouge out a K-9’s eyes while the K-9 was trying to do his job.” Defendant’s trial counsel responded: “I really do not see a nexus here. He had no weapons in this case. There was a dog on him and he was trying to get the dog off. I don’t see where that constitutes a nexus for no dangerous or deadly weapons during the period of probation. There was -- he had no weapon. I do not see the nexus at all.” The court found that the condition was

“warranted as it relates to [the resisting and harming counts] and that there is a nexus for it.” The court specifically cited “the violent nature of what occurred”

Defendant’s trial counsel then argued that the language “dangerous or deadly weapons under the law . . . is vague, and I would ask that the court say with the intent to use them as such -- that’s my request.” The prosecution objected on the ground that the recommended probation condition’s terms “have been pass mustered [*sic*] through the county counsel’s office. If counsel wants to take this up with the Sixth, I’m sure that they can hear her argument.” The court found the “language” of the probation condition “appropriate.” Since “it has to be deemed as a dangerous or deadly weapon under the law . . . I think that will address any vagueness and overbreadth of the language.”

The court suspended imposition of sentence and granted probation conditioned on a seven-month jail term. It ordered as a condition of probation that defendant was “not to knowingly possess any item that under the law would be considered a deadly or dangerous weapon during the period of probation.” Defendant timely filed a notice of appeal.

II. Analysis

“Trial courts have broad discretion to impose such reasonable probation conditions ‘as [they] may determine are fitting and proper to the end that justice may be done . . . and generally and specifically for the reformation and rehabilitation of the probationer’” (*People v. Chardon* (1999) 77 Cal.App.4th 205, 217; Pen. Code, § 1203.1, subd. (j).) “A condition of probation will not be held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’ [Citation.]” (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).) A court abuses its discretion under the *Lent* standard only “when its

determination is arbitrary or capricious or ““exceeds the bounds of reason, all of the circumstances being considered.”” (*People v. Welch* (1993) 5 Cal.4th 228, 234.)

Although the trial court concluded that the weapon condition was related to the offense of harming a police dog because that conduct was violent, the Attorney General defends the condition solely on the ground that it was related to defendant’s future criminality. We find that the court did not abuse its discretion under all of the circumstances in finding that the weapon condition was reasonably related to defendant’s future criminality.

Defendant has no prior convictions involving the use of dangerous or deadly weapons, and his current offenses also did not involve the use of dangerous or deadly weapons. However, his violent assault on Scotty demonstrated that he is willing to use force to escape the clutches of law enforcement. This conduct raises reasonable concerns about the safety of those supervising defendant’s probation. Should defendant anticipate that a probation officer or law enforcement officer may find that he has violated his probation, his prior conduct suggests his willingness to use whatever means are necessary to ensure his freedom. Barring him from possessing dangerous or deadly weapons has the potential to mitigate the threat that defendant’s violence may pose to such officers.

Defendant takes the position that his assault on Scotty is irrelevant because he did not use a dangerous or deadly weapon in that assault. We disagree. The trial court could have reasonably concluded that defendant’s assault on Scotty demonstrated a propensity for violence that would have been heightened had defendant had access at that moment to a weapon. It is eminently reasonable to conclude that a man who would use his bare hands to attempt to pry a police dog’s mouth from him and to attempt to gouge the police dog’s eyes would be willing to use any available weapon to ward off a human or canine officer under similar circumstances. After all, as defendant points out, many ordinary objects may be utilized as deadly or dangerous weapons. And such weapons have a greater potential to do harm than one’s bare hands. Defendant’s violence against Scotty

with his bare hands does not demonstrate that defendant is unwilling to use anything but his bare hands but only that no such weapon was within his grasp at that time.

Defendant claims that his violence against Scotty does not demonstrate that the weapon condition is related to his future criminality. He makes no effort to address the holding in *People v. Olguin* (2008) 45 Cal.4th 375 (*Olguin*), which takes a very broad view of the future criminality prong of *Lent*. In *Olguin*, a defendant convicted of driving under the influence challenged a probation condition requiring him to inform the probation officer of any pets at his residence. (*Olguin*, at p. 378.) The California Supreme Court acknowledged that the pets condition had no relation to the defendant's crimes and did not concern criminal conduct, but it found that condition reasonable as related to defendant's future criminality. "The condition requiring notification of the presence of pets is reasonably related to future criminality because it serves to inform and protect a probation officer charged with supervising a probationer's compliance with specific conditions of probation. . . . Probation officer safety . . . is essential to the effective supervision of the probationer and thus assists in preventing future criminality. Therefore, the protection of the probation officer while performing supervisory duties is reasonably related to the rehabilitation of a probationer for the purpose of deterring future criminality." (*Id.* at p. 381.)

The protection of the probation officer and other law enforcement officers supervising defendant's probation is equally important in this case. The threat posed by defendant's possession of dangerous or deadly weapons is an even greater threat to those officers in this case due to defendant's willingness to use force against a canine officer in the commission of his current offenses.

Defendant does not challenge the California Supreme Court's reasoning in *Olguin* (even in his reply brief after the Attorney General relied on *Olguin*) and instead relies on a string of Court of Appeal cases that predate *Olguin* by decades. (*People v. Burton* (1981) 117 Cal.App.3d 382; *People v. Mayers* (1980) 110 Cal.App.3d 809; *In re*

Martinez (1978) 86 Cal.App.3d 577.) Since we are bound by *Olguin* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we need not discuss these pre-*Olguin* Court of Appeal cases.

Defendant's alternative argument is that the trial court abused its discretion in refusing to add the language suggested by his trial counsel. He claims that the condition is vague and overbroad without this added language.

“[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.] The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions.’” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*)) “In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that ‘abstract legal commands must be applied in a specific *context*,’ and that, although not admitting of ‘mathematical certainty,’ the language used must have “‘reasonable specificity.’” (*Ibid.*) “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.]” (*Ibid.*)

Defendant claims that the condition was invalid because many ordinary objects could be considered dangerous or deadly weapons if a person used or intended to use the objects as such. He maintains that the condition, as imposed, would subject him “to a violation of his probation for possessing any number of items *absent the intent* to use it as a deadly or dangerous weapon.”

Defendant seems to intentionally misread the actual condition that was imposed by the trial court. The condition, as imposed, applies only to defendant’s “knowing[] possess[ion of] any item *that under the law would be considered* a deadly or dangerous weapon” (*Italics added.*) The discussion of this condition in defendant’s presence

when it was imposed made clear that he would not violate it unless he intended to use the item as a weapon, and the wording of the condition confirmed that understanding. The only items that “under the law would be considered a deadly or dangerous weapon” are those that are possessed with the intent to use them as weapons.

“[L]egal definitions of ‘deadly or dangerous weapon,’ ‘deadly weapon,’ ‘dangerous weapon,’ and use in a ‘dangerous or deadly’ manner, consistently include the harmful capability of the item and the intent of its user to inflict, or threaten to inflict, great bodily injury. As a result of these well-defined terms, the phrase ‘dangerous or deadly weapon’ is clearly established in the law. Accordingly, the ‘no-dangerous-or-deadly-weapon’ probation condition is sufficiently precise for [defendant] to know what is required of him.” (*In re R.P.* (2009) 176 Cal.App.4th 562, 568.) Here, the probation condition applied only to those items that “under the law would be considered a deadly or dangerous weapon.” This condition was “sufficiently precise” for defendant, the probation officer, law enforcement, and the court to know which items were included within the prohibition—only those items that were intended to be used as weapons. The condition is not vague.

Defendant’s overbreadth challenge, to the extent he makes one, is similarly meritless. “A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Under this doctrine, ““a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”” [Citations.]” (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497.) “‘A law’s overbreadth represents the failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference.’

[Citation.]” (*Ibid.*) Because the probation condition applied solely to items that defendant intended to use as weapons, it was closely tailored to its purpose and did not infringe on any of defendant’s constitutional rights.

III. Disposition

The probation order is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.

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